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NO. 74-1315

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

RAY HULEN PLESS,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Daniel Hartnett
AYRES, HARTNETT & CUSTIS
Court Green
Accomac, Virginia 23301

April, 1975

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Ray Hulen Pless, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above styled cause on the 31st day of January, 1975.

OPINIONS BELOW

The order of the Circuit Court for

the County of Accomack, State of Virginia, dated May 9, 1974, holding the petitioner an "habitual offender" is set forth in the certified record formerly filed at page 15.

The judgment of the Supreme Court of Virginia was rendered without an opinion, said judgment order being set forth in the certified record formerly filed at page 18.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The petitioner presents one question for determination:

1. Was the retroactive application of the Virginia Habitual Offender Act, Va. Code Ann. § 46.1-387.2 et seq. (Repl.

Vol. 1974), Appendix, infra, ex post facto prohibited by U.S. Const. Art. I § 10 and U.S. Const. amend. XIV?

STATUTES INVOLVED

The following Virginia statutes, which are included in the Appendix, infra, are involved: Va. Code Ann. §§ 46.1-387.2, 46.1-387.4, 46.1-387.8, 46.1-387.10 (Repl. Vol. 1974).

STATEMENT

On the 5th day of April, 1967, the petitioner was found guilty in the State of Maryland of "Driving (sic) Under Influence".

On the 30th day of September, 1967, the petitioner was found guilty in the State of Maryland of "Did oper. A M/V While under the Influence of Alcohol".

On August 7, 1972, the petitioner was found guilty in Accomack County,

Virginia, of "Unreasonable Refusal of Blood Test" and "Driving While Drunk".

Upon receipt of a sworn statement from the Deputy Commissioner of the Division of Motor Vehicles stating that the petitioner had been convicted of the above offenses, thus bringing him within the purview of the Virginia Habitual Offender Act, the Commonwealth's Attorney for Accomack County instituted proceedings against the petitioner under the provisions of the Act resulting in his conviction on May 9, 1974, revocation and suspension being effected in Virginia for a period of ten years under reciprocity as shown in the certified record, pages 2 and 15, which judgment was affirmed by the Virginia Supreme Court (Certified Record, p.18).

The effective date of the Virginia Habitual Offender Act was June 28, 1968.

REASONS FOR GRANTING THE WRIT

At the outset it is conceded that under other provisions of the Code of Virginia, 1950, as amended, dealing with motor vehicles, the Commissioner of Motor Vehicles has the power to suspend and revoke an operator's license. His power to revoke and suspend has been upheld by the Virginia Supreme Court as in Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941) and Commonwealth v. Ellett, 174 Va. 403, 4 S.E.2d 762 (1939). The rationale for these decisions as stated in Prichard v. Battle at S.E.2d 395 is:

> The revocation is no part of the punishment fixed by the jury or by the court wherein the offender is tried /Citation omitted/. Nor is it, in our opinion an added punishment for the offense committed. It is civil and not criminal in its nature /Citations omitted/ /Emphasis added/.

It is submitted that the Virginia Habitual Offender Act is criminal in

nature, not civil. Under its provisions, id. § § 46.1-387.4, 46.1-387.5, 46.1-387.6, the matter is referred to the Commonwealth's Attorney and then it is adjudicated by a court of record sitting wherein the accused resides. The court below enters the order not to operate a motor vehicle on the highways of the Commonwealth of Virginia. In id. § 46.1-387.10 it is stated:

> An appeal to the Supreme Court of Appeals of Virginia may be had from any final action or order of a court of record entered under the provisions of this article in the same manner and form as such an appeal would be noted, perfected and tried in any criminal case /Emphasis added/.

Further, it might be added that under the provisions of the Act an habitual offender caught operating a motor vehicle, after such adjudication, is prosecuted as a felon and if convicted, subjected to a harsh penalty. The import of this statute

is a criminal proceeding. Further, the conviction of one of the offenses enumerated in id. § 46.1-387.2 does not operate to revoke the license, but it is the operation of this Act under a separate proceeding that results in the revocation of the license.

Petitioner next contends that this Act being criminal in nature is an ex post facto law, and thus prohibited by the U.S. Const. Art. I § 10, applicable to the states under U.S. Const. amend. XIV.

In 16 Am. Jur. 2d, Constitutional Law, § 396 (1964), referring to Calder v. Bull, 3 Dall (U.S.) 386, 1 L ed 648, it is stated in part with regard to ex post facto laws:

> The early and classic definition is as follows: ... (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the

> punishment, and inflicts a greater punishment than the law annexed to the crime when committed;...

There can be no doubt that the Virginia Habitual Offender Act has aggravated certain traffic offenses and inflicted a greater punishment for these offenses retroactively.

The Habitual Offender Act is clearly retrospective in its application. The gravamen of this conviction of being an habitual offender depends upon crimes or offenses committed before June 28, 1968, or the effective date of the Act. The Legislature is seeking therefore to reach back into the immediate past preceding the passage of the Act to elevate a crime to a higher degree committed subsequent to the Act.

If it is criminal in nature as previously submitted, then such an endeavor on the part of the Legislature

is clearly unconstitutional viewed even from the most rudimentary standpoint of individual rights.

Concededly, the general view in respect to the character of the granting of an operator's permit is that of conferring a privilege upon the citizen. Such view is made clear in Commonwealth v. Ellett, supra, wherein the court declared that there was a distinction between a natural right and a conditional privilege, the court stating that the granting of the operator's permit was not a natural right. Other states have followed the same rationale by declining to acknowledge the granting of a permit as a vested right, 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 112 (1963).

The above rationale has in the view of your petitioner been drastically changed by the holding of this Court in

Bell v. Burson, 402 U.S. 535 (1971). In that case Mr. Justice Brennan shattered the anachronistic distinction between "right" and "privilege" concerning the permit to drive an automobile. At. U.S. 539 the learned justice states:

> Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege". [Citations omitted.]

The petitioner likewise maintains that whether the granting of the permit is classified as a permit, natural right, or vested right, it is one so vital in modern society that any retrospective application of a law working a deprivation

on the individual falls within the same constitutional prohibitions as set forth above. This is so whether one is referring to the ex post facto application of a criminal statute to deprive one of his permit to drive or whether it is merely the retroactive deprivation of a vested right to deprive one of his privilege to drive.

The law has for centuries created neat pigeon holes such as "privilege", "vested right," and "natural right" that they are now bandied as a shibboleth by which any court, judge or person may act inviolate to deprive a citizen of rights vital to his wellbeing and existence - but no longer.

It is finally submitted that Bell v. Burson, supra, nullifies the Virginia decisions referred to above entitling your petitioner to a writ of certiorari to review the unconstitutional holding

of that state.

CONCLUSION

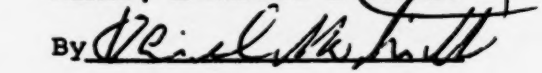
For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RAY HULEN PLESS

By Counsel

AYRES, HARTNETT & CURTIS

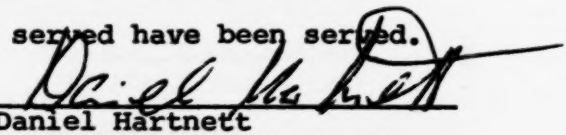
By 

Court Green
Accomac, Virginia 23301

COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 1975, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to the Hon. Andrew P. Miller, Attorney General of the State of Virginia, Supreme Court-State Library Building, Richmond, Virginia 23219, counsel for respondent. I further certify that all parties required to be served have been served.



Daniel Hartnett
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Accomac, Virginia 23301

Counsel for Petitioner

APPENDIX

Va. Code Ann. § 46.1-387.2 (Repl. Vol. 1974):

Habitual offender defined. — An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsections (a), (b), and (c), of this section, committed within a ten-year period, provided that where more than one included offense shall be committed within a six-hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article, and provided further the date of the offense most recently committed occurs on or after June twenty-eighth, nineteen hundred sixty-eight, and within ten years of the date of all other offenses the conviction for which is included in subsections (a), (b) or (c) as follows:

(a) Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate and distinct offenses arising out of separate acts:

(1) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;

(2) Driving or operating a motor vehicle while under the influence of intoxicants or drugs in violation of § 18.1-54;

(3) [Repealed.]

(4) Driving a motor vehicle while his license, permit or privilege to drive a motor vehicle has been suspended or revoked in violation of §§ 18.1-60, 46.1-350 or 46.1-351;

(5) [Repealed.]

(6) Knowingly making any false affidavit or swearing or affirming falsely to any matter or thing required by the motor vehicle laws or as to information required in the administration of such laws in violation of § 46.1-15;

(7) Any offense punishable as a felony under the motor vehicle laws of Virginia or any felony in the commission of which a motor vehicle is used;

(8) Failure of the driver of a motor vehicle involved in an accident resulting in the death or injury of any person to stop close to the scene of such accident and report his identity in violation of § 46.1-176; or

(9) Failure of the driver of a motor vehicle involved in an accident resulting only in damage to an unattended vehicle or other property in excess of two hundred fifty dollars to stop close to the scene of such accident and report his identity or otherwise report such accident in violation of law.

(b) Twelve or more convictions, or findings of not innocent in the case of a juvenile, of separate and distinct offenses, singularly or in combination, in the operation of a motor vehicle which are required to be reported to the Division of Motor Vehicles and the commission whereof requires the Division of Motor Vehicles or authorizes a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subsection (a) above when taken with and added to those offenses described herein.

(c) The offenses included in subsections (a) and (b) hereof shall be deemed to include offenses under any valid town, city or county ordinance paralleling and substantially conforming to the State statutory provisions cited in subsections (a) and (b) hereof and all changes in or amendments thereof, and any federal law, any law of another state or any valid town, city or county ordinance of another state substantially conforming to the aforesaid State statutory provisions.

(d) Any person, twenty-one years of age, or older who has been adjudged an habitual offender based in whole or in part on findings of not innocent as a juvenile may petition the court in which he was found to be an habitual offender, or any circuit court in Virginia having criminal jurisdiction in the political subdivision in which such person now resides, for restoration of his privilege to operate a motor vehicle in this State.

Upon such petition, and for good cause shown, such court may, in its discretion, restore to such person the privilege to operate a motor vehicle in this State upon such terms and conditions as the court may prescribe, subject to other provisions of law relating to the issuance of operators' or chauffers' licenses.

Va. Code Ann. § 46.1-387.4 (Repl. Vol. 1974):

Information to be filed by attorney for Commonwealth. — The attorney for the Commonwealth, upon receiving the aforesaid transcripts or abstracts from the Commissioner, shall forthwith file information against the person named therein in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides. In the event such person is a nonresident of this State, the attorney for the Commonwealth of the City of Richmond shall file information against the accused person in the Circuit Court of the city of Richmond. The clerk of the Circuit Court of the city of Richmond shall be allowed a fee of five dollars for each such information filed against such nonresident accused to be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court as provided in § 19.1-317 and to be taxed against the defendant as a part of the costs of such proceeding, if the defendant is found to be an habitual offender. In the event the accused is an inmate of the Virginia State Penitentiary, jurisdiction for the

proceedings shall be as provided in § 53-295.

Va. Code Ann. § 46.1-387.8 (Repl. Vol. 1974):

Operation of motor vehicle by habitual offender prohibited; penalty; enforcement of section. — It shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect, except that such an order shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State, while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years and no portion of such sentence shall be suspended, except that in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

For the purpose of enforcing this section, in any case in which the accused

is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this State. If the court determines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial.

Va. Code Ann. § 46.1-387.10 (Repl. Vol. 1974):

Appeals. — An appeal to the Supreme Court of Appeals of Virginia may be had from any final action or order of a court of record entered under the provisions of this article in the same manner and form as such an appeal would be noted, perfected and tried in any criminal case.

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to the Supreme Court of Virginia

BRIEF IN OPPOSITION

Pursuant to the Rules of the Supreme Court of the United States, respondent files this brief in opposition to the granting of petition for writ of certiorari on the grounds hereinafter stated.

The petitioner admits the convictions which bring him squarely under the "Virginia Habitual Offender Act." He seeks a writ against a finding of the Supreme Court of Virginia on January 31, 1975, in consideration of his petition for a writ of error from a judgment rendered by the Circuit Court of Accomack County on the 9th day of May, 1974, which states, in part, "the court being of opinion that there

is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court." He presents one question for determination: "1. Was the retroactive application of the Virginia Habitual Offender Act, Va. Code Ann. § 46.1-387.2 *et seq.* (Repl. Vol. 1974), Appendix, *infra, ex post facto* prohibited by U.S. Const. Art. I § 10 and U.S. Const. amend. XIV?"

Contrary to his contention, the law is not retrospective in its application inasmuch as it provides that the date of the offense most recently committed must occur on or after the effective date of the act. There is no contention by the petitioner that his record does not bring him within the scope of the act, nor does he contend that he did not commit an offense after the effective date of the act, as indicated by his convictions for "Driving While Drunk" and "Unreasonable Refusal of Blood Test" on August 7, 1972, more than twenty-five months after the act became effective. It is submitted that he had ample time to familiarize himself with the law, and its invocation against his driving privilege was brought about by his violations after the law became effective, rather than by any retrospective application of the law. The violations of the law after its effective date were of his own choosing.

The authorities found generally agree that the phrase *ex post facto* embraces only such laws as impose or affect punishment for a crime. The Virginia Habitual Offender Act neither aggravates a crime nor does it inflict a greater punishment. It simply prohibits that person from operating a motor vehicle upon the public highways whose disregard for the traffic laws and the safety of other users of the highway, as shown by his record of serious traffic violations,

demonstrates his indifference for the safety and welfare of others. Its declared purpose is to impose increased and added deprivation of the privilege to operate motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws. It contains no reference to fines or imprisonment or to any form of "punishment," and it imposes none.

The instant case involves only the finding of habitual offender and the resulting prohibition against operating motor vehicles upon the highways of Virginia. This Court has previously considered the question of constitutionality of a conviction for driving after a revocation of license under the Habitual Offender Act and dismissed the appeal "for want of a substantial federal question" in the case of *Harry Virgil Rexrode* v. *Commonwealth of Virginia*, reported in United States Supreme Court Reports, Vol. 23 L.Ed., No. 7, page 678. February 5, 1973. Insofar as it concerns that part of the act which petitioner has brought into question before this Honorable Court because of its prohibition against his driving, it is clear that the act is civil in nature and not criminal. In the parallel case of *Huffman* v. *Commonwealth*, 210 Va. 530, 172 S.E. 2d 788 (1970), the Supreme Court of Virginia stated the following:

> "In the first place, it is well settled that the constitutional prohibition against an *ex post facto* law applies to criminal proceedings and not to civil proceedings. *Commonwealth* v. *United Cigarette Co.*, 120 Va. 835, 839, 840, 92 S.E. 901, 902 (1917).
>
> "In the next place, we have held that a proceeding to revoke an automobile driver's permit or license is a civil and not a criminal proceeding; that the revocation is not for the punishment of the offender, but is for the protection of the public in removing from the highways a dangerous driver. *Pritchard* v. *Battle*, 178 Va. 455,

462, 17 S.E. 2d 393, 395-96 (1941); *Butler* v. *Commonwealth,* 189 Va. 411, 423, 424, 53 S.E. 2d 152, 157 (1949); *Prillaman* v. *Commonwealth,* 199 Va. 401, 406. 100 S.E. 2d 4, 8 (1957)."

Since the *Huffman* case, *supra,* the Supreme Court of Virginia has said in *McIntosh* v. *Commonwealth,* 213 Va. 330, 333, 191 S.E. 2d 791 (1972):

> "We hold that the 1970 amendment which repealed § 46.1-387.2 (a) (5) does not operate retrospectively, either expressly or by necessary implication, and that the Habitual Offender Act, as amended, does not offend the provisions of the Fourteenth Amendment to the Constitution of the United States or the cognate provisions of the Constitution of Virginia."

Finally, petitioner cites from the case of *Bell* v. *Burson,* 402 U.S. 535 (1971) certain language related to "procedural due process required by the Fourteenth Amendment." Prior to his petition to this Court he has alleged no failure in respect to due process under the Virginia statutes, nor in relation to the proceedings finding him an habitual offender. There was certainly nothing in the *Bell* case which would intimate that the proceedings under the Habitual Offender Act, to prohibit a person from operating a motor vehicle on the highways, are criminal proceedings, or that such proceedings would be in conflict with the constitutional prohibition against *ex post facto* laws.

CONCLUSION

For the reasons herein expressed, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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A. R. WOODROOF
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CERTIFICATE OF SERVICE

This is to certify that service was made pursuant to U.S. Supreme Court Rule 33, paragraph 1, by mailing three copies of Brief in Opposition by first class mail to Mr. Daniel Hartnett, Ayres, Hartnett & Custis, Court Green, Accomac, Virginia 23301, counsel of record for Ray Hulen Pless, petitioner, on or before filing the same with the Clerk of the Supreme Court of the United States.

A. R. WOODROOF
Assistant Attorney General